Supreme Court, U.S.
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No. 95-202

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

FRED and JANET YOUNG, d/b/a YOUNG'S DELI
and formerly d/b/a COUNTRY FAIR STORE NO. 90,
on behalf of themselves and all others similarly situated;
JAMES FOORE, d/b/a COUNTRY FAIR STORE NO. 87,
on behalf of himself and all others similarly situated,
Petitioners,

v.

COUNTRY FAIR, INC.; MEADOW BROOK DAIRY COMPANY;
RAYMOND L. McGARVEY; KEITH McGARVEY;
GEORGE ARTHUR; GERALD GARCIA,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether former franchisees, who unilaterally terminated their franchise agreement without notice and maintained possession of the site of their former franchise store while they instituted suit, are entitled to a mandatory preliminary injunction forcing the franchisor to allow them to operate the franchisor's gasoline equipment and remain exposed to liability where the former franchisees have failed to allege legally cognizable irreparable harm.

2. Whether a franchisee, whom the franchisor seeks to terminate pursuant to the terms of the franchise agreement, is entitled to a preliminary injunction requiring the franchisor to continue the franchise agreement which the franchisee is simultaneously seeking to have rendered null and void.

3. Alternatively, whether a franchisee, whom the franchisor seeks to terminate pursuant to the terms of the franchise agreement, is entitled to a preliminary injunction terminating the franchise agreement but allowing him to remain on the franchisor's leasehold premises and use the franchisor's equipment.

RULE 29.1 LISTING

Respondent Country Fair, Inc. is a privately owned corporation which has no parent companies and no subsidiaries.

Respondent Meadow Brook Dairy Company is a subsidiary of Dean Foods, Inc., a publicly traded corporation.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF CASE

Respondent Country Fair, Inc. ("Country Fair")[1] is a franchisor and operator of convenience food stores in Western

1. This case was instituted against Country Fair, several of its officers and directors and Meadow Brook Dairy Company. Because the issues addressed in the Petition for Writ of Certiorari affect only Country Fair, it alone will respond to the Petition.

Pennsylvania and Eastern Ohio. (Young J.A. 1033). Petitioners Fred and Janet Young were Country Fair franchisees until January 4, 1993, when they unilaterally and without notice terminated their Country Fair franchise agreement. (Young J.A. 1026). Despite terminating their agreement with Country Fair, the Youngs remained on Country Fair's leasehold premises and continued to operate a convenience store. Thereafter, Country Fair secured the gasoline equipment at the premises which it owned, insured and for which it was liable. The Youngs sought a mandatory injunction requiring Country Fair to unlock its gasoline equipment to enable the Youngs to dispense and sell gasoline pending trial.

Petitioner James Foore ("Foore") was a Country Fair franchisee from January, 1989 until July, 1994, when Country Fair terminated its franchise agreement with him.[2] Mr. Foore sought a preliminary injunction prohibiting Country Fair from terminating his franchise agreement pending trial. Alternatively, Mr. Foore sought an injunction terminating his franchise relationship with Country Fair but permitting him to remain at the site of his former franchise store and use Country Fair's leasehold and equipment. Country Fair contends, and the courts below found, that neither the Youngs nor Mr. Foore are entitled to a preliminary injunction because neither satisfied any of the requirements for a preliminary injunction, including immediate irreparable injury.

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2. Mr. Foore filed his Motion for a Preliminary Injunction with the District Court on February 11, 1994 to prevent Country Fair's termination of his franchise agreement. Country Fair voluntarily agreed not to effectuate the termination pending the court's decision. His motion was denied on July 14, 1994. Mr. Foore filed a Notice of Appeal of the District Court's denial of his motion with the Third Circuit on July 24, 1994 as well as a Motion for Stay. Following the Third Circuit's denial of his Motion for Stay, Country Fair terminated Mr. Foore's franchise agreement. For purposes of this Brief in Opposition, however, Country Fair will discuss Mr. Foore's Motion as if he were still a Country Fair franchisee since the termination of his agreement did not occur until after he filed his Notice of Appeal. *See Bateman v. Ford Motor Co.*, 302 F.2d 63 (3d Cir. 1962).

1. The Youngs' Relationship With Country Fair

Prior to entering their franchise relationship with Country Fair, the Youngs had a franchise agreement with Convenient Food Mart of Western Pennsylvania, Inc. ("CFM"), another convenience food store franchisor. (Young J.A. 1265). The Youngs operated a CFM franchise from 1984 until February 1986 at the same site they occupy to this day (the "Premises"). (Young J.A. 1265). CFM leased the Premises from its owners, Stephen and Dorothy Lefes (the "Lefeses"). *Id.* Pursuant to that lease and with the Lefeses' consent, CFM subleased the Premises to the Youngs. *Id.*

In 1985, CFM entered into an agreement with Klasen Oil Company ("Klasen") under which Klasen installed gasoline equipment and leased a portion of the Premises for gasoline sales. (Young J.A. 1265). Pursuant to this agreement, the Youngs received compensation from Klasen only for gasoline sold in excess of 5,000 gallons each week. (Young J.A. at 1266). Klasen retained ownership in the equipment and all gasoline sold on the Premises. Klasen also reserved the right to set the prices for all gasoline sold by the Youngs.

In February, 1986, Country Fair acquired CFM's franchise business in Western Pennsylvania. In conjunction with this acquisition, CFM assigned to Country Fair all of its rights and obligations under its lease with the Lefeses, as well as its rights and obligations under its sublease with the Youngs. (Young J.A. 1265-66). At that time, the Youngs terminated their franchise agreement with CFM and entered into a franchise agreement with Country Fair. (Young J.A. 1265). The Youngs insisted their Country Fair franchise agreement be virtually identical to their former franchise agreement with CFM, rather than utilizing the standard Country Fair agreement. *Id.*

In August, 1987, Klasen sold all of its gasoline equipment on the Premises to Country Fair and transferred all of its rights under the agreement between Klasen, CFM and the Lefeses to Country Fair. (Young J.A. 1266). At about that time, the Youngs and Country Fair agreed to a gasoline addendum to their franchise agreement. *Id.* The addendum provided that Country Fair owned all of the gasoline and

gasoline equipment; would purchase the gasoline; and pay for the maintenance of the gasoline equipment, liability insurance and all regulatory compliance costs. (Young J.A. 1267). The addendum provided that as owner of the gasoline, Country Fair would set the sales price for its gas. The Youngs received 25% of the gross profits on all gasoline sales, after depreciation, repairs and maintenance. (Young J.A. 1266). The effect of the new agreement was to increase the Young's share of gas sales income.

On January 4, 1993, the Youngs filed their Complaint against Country Fair, several of its officers and directors, and Meadow Brook Dairy Company. (Young J.A. 1025-1198). The Complaint asserted twenty-seven separate causes of action against the defendants for alleged antitrust violations, RICO violations, FTC Act and FLSA claims and common law claims including fraud, conversion, breach of contract and intentional infliction of emotional distress.[3] *Id.* The Complaint alleges that the franchise arrangement which the Youngs insisted upon was inherently fraudulent. (Young J.A. 1025-1081). The Complaint seeks, among other forms of relief, rescission of the franchise agreement.

Simultaneously with filing their Complaint, the Youngs, without notice, terminated their franchise agreement with Country Fair. At that time, they ceased using the Country Fair name but held over at the site of their former franchise store. They remain at the site to this day. In addition, the Youngs continued to use Country Fair's gasoline equipment and sold Country Fair's gas from January 4 to January 7, 1993. (Young J.A. 1260). The Youngs did not and have not submitted any reimbursement to Country Fair for the sale of Country Fair's gas or use of its equipment during this period. (Young J.A. 1267). On January 7, 1993, in order to prevent the continued conversion of its property, Country Fair placed locks on its gasoline pumps. *Id.* at 1260. *Eight months later,* the Youngs

3. On December 23, 1993, the District Court dismissed the RICO, FTC Act and intentional infliction of emotional distress claims. (Young J.A. 1271-1296).

filed their motion for a mandatory preliminary injunction seeking an order requiring Country Fair to provide its gasoline equipment to them.

2. Mr. Foore's Relationship With Country Fair

Like the Youngs, Mr. Foore was also a Country Fair franchisee. (Foore J.A. 20). Mr. Foore became a Country Fair franchisee in January, 1989. (Foore J.A. 98). Prior to becoming a Country Fair franchisee, Mr. Foore had been employed at another Country Fair franchise. In late 1988, Mr. Foore approached Country Fair and asked if he could franchise its Wheatland store. (Foore J.A. 168). He was warned about the shortcomings of the store's location and facilities, and counseled as to the store's low sales volume and the fact that gasoline sales could not be added because the lot was too small. *Id.* Despite those warnings, Mr. Foore stated he could make the store profitable. *Id.*

In January 1989, a franchise agreement was executed by Mr. Foore and Country Fair. (Foore J.A. 168). That agreement provided, among other things, that Country Fair and Mr. Foore would split the gross profits at the store on a 50/50 basis. (Foore J.A. 82). Further, the agreement provided that *either* party could terminate the agreement with thirty days' notice. (Foore J.A. 78).

The premises on which Mr. Foore's store is located is owned by the Scoccia family and leased to Country Fair. (Foore J.A. 169). Country Fair is contractually obligated under the Scoccia lease until 1998. *Id.* Under that lease, Country Fair rents the premises for $1,500 per month. *Id.* It is also required to maintain insurance on the premises at an annual cost of $1,937. *Id.* In addition, Country Fair is obligated to pay for utilities and repairs to the premises. *Id.* Mr. Foore was never charged for any of these property related costs. *Id.* All of these property related expenses and costs were paid out of *Country Fair's portion* of the gross profits at the Foore store. *Id.*

Country Fair owns all of the equipment in the Foore store. (Foore J.A. 169). This equipment was purchased for

$106,915. (Foore J.A. 170). Mr. Foore was never charged for the equipment nor for its use. *Id.*

Although during his first year as a franchisee, Mr. Foore appeared to operate the store in a competent manner, since 1990 sales at the Foore store declined. (Foore J.A. 170). Commencing in 1990 and continuing through 1993, Country Fair provided Mr. Foore with written notice of various problems at his store on numerous occasions. (Foore J.A. 171). Also commencing in 1990, due to the declining sales, Country Fair discontinued charging Mr. Foore interest on his debt. (Foore J.A. 170). Country Fair also agreed to change the gross profit split from 50/50 to 55/45 (Foore/Country Fair). *Id.* Country Fair made these accommodations to assist Mr. Foore through what was hoped to be a temporary business downturn. *Id.*

Unfortunately, sales continued to decline in 1991 at Mr. Foore's store. (Foore J.A. 170). In 1992, Country Fair agreed to absorb all costs in promoting minimum price cigarette sales and to absorb any additional losses by further adjusting the gross profit split in Mr. Foore's favor. These adjustments resulted in a gross profit split in 1992 of approximately 70/30 (Foore/Country Fair). (Foore J.A. 170-71). As a result of these accommodations, Country Fair incurred losses of $46,263 and $46,650 in 1991 and 1992 on the Foore store. *Id.*

In late 1992, Mr. Foore advised Country Fair that he was experiencing stress related health problems and wished to cease his franchise relationship. (Foore J.A. 172). On February 3, 1993, Country Fair informed Mr. Foore that due to his desire to end the relationship and the continuing losses at the store, it would be willing to terminate the relationship, forgive Mr. Foore's debt, and return his initial investment. *(Id.)*

Mr. Foore asked for time to consider the offer, but never responded. (Foore J.A. 173). Instead, on February 17, 1993, the Youngs' counsel informed Country Fair's counsel she was also representing Mr. Foore.[4] *Id.* She further stated that she deemed Country Fair's offer to Mr. Foore a "secret settlement

4. Although Mr. Foore was represented by counsel as of February, 1993, he did not intervene in the Young lawsuit until January, 1994.

agreement". *Id.* As a result of counsel's threats, Country Fair ceased communication with Mr. Foore concerning the offer. *Id.*

Losses continued at the Foore store and, in 1993, Country Fair incurred a loss of $44,585 on his store. (Foore J.A. 173). In January, 1994, as a result of the losses and the deteriorating relationship between Country Fair and Mr. Foore, Country Fair elected to terminate Mr. Foore's franchise agreement pursuant to the thirty day notice provision of Article 15 of the franchise agreement. *Id.* Country Fair, however, agreed not to effectuate the termination until the district court had an opportunity to rule on Mr. Foore's Motion for Preliminary Injunction.

Mr. Foore filed his Complaint in Intervention on January 13, 1994. Like the Youngs, Mr. Foore alleges that the Country Fair franchise system is inherently fraudulent and seeks the *termination* of his franchise relationship with Country Fair. On February 11, 1994, however, Mr. Foore filed a motion for preliminary injunction to *prevent* the termination of his franchise agreement pending trial. Alternatively, Mr. Foore sought an order which would terminate the franchise agreement but allow him to remain on Country Fair's leasehold premises and use Country Fair's equipment so that he could run an "independent" store.

3. Opinions Of The Courts Below

The District Court denied the Youngs' Motion for Preliminary Injunction as well as their subsequent Motion for Reconsideration. Since the Youngs were seeking mandatory preliminary injunctive relief, the court noted a plaintiff's burden to establish the elements for a mandatory preliminary injunction is heightened and particularly heavy. (Petitioners' App. A-19).

The District Court found the Youngs failed to meet their burden of showing immediate irreparable injury. (Petitioners' App. A-20). Even assuming all of the Youngs assertions as true, the harm they would suffer if the gasoline equipment remained locked would be solely economic and compensable

by money damages. Relying on the Third Circuit's decision in *Frank's GMC Truck Center, Inc. v. General Motors Corp.*, 847 F.2d 100 (3d Cir. 1988), the court held that purely economic damages do not constitute irreparable injury and hence, the Youngs had not satisfied the requirements necessary to attain a preliminary injunction. (Petitioners' App. A-20).

Moreover, the court also determined that the Youngs' argument that they *might* lose goodwill without a preliminary injunction was insufficient. Relying on *Ralph Rosenberg Court Reporters, Inc. v. Fazio,* 811 F.Supp. 1432 (D.Hawaii 1993), the court held that the Youngs' allegation that they might lose goodwill was wholly speculative and did not constitute *imminent* irreparable injury. (Petitioners' App. A-21).

The District Court also denied Mr. Foore's Motion for a Preliminary Injunction. Similar to its findings with respect to the Youngs, the court determined that Mr. Foore had not made a clear showing of immediate irreparable injury. The court concluded that the only harm which could result from the termination of the franchise agreement was economic injury. *Id.* The court held that Mr. Foore had an adequate remedy at law to recover his economic injury should he be successful at trial. (Petitioners' App. A-16).

The court also found Country Fair's termination of the franchise agreement would not impair the court's ability to grant an effective remedy. (Petitioners' App. A-15). Additionally, the court noted that since Mr. Foore was ultimately seeking to have the franchise agreement rescinded and declared unenforceable, Country Fair's decision to terminate the agreement would not preclude the court from rescinding the agreement should Mr. Foore prove successful on the merits of his case.

Finally, in addressing Mr. Foore's alternative request for relief, the court found Mr. Foore's request to terminate his franchise agreement and remain on the premises untenable. (Petitioners' App. A-16). The District Court found that even if Mr. Foore were to succeed on the merits, he could not compel this result since he would be entitled to damages and not gifts of land and equipment. *Id.*

The Third Circuit affirmed the District Court's denial of both the Youngs' and Mr. Foore's Motions for Preliminary Injunction. The Third Circuit agreed with the District Court that the Youngs were not in danger of suffering irreparable injury because any injury which would result from the loss of customer traffic is purely economic. (Petitioners' App. A-7). Moreover, the Third Circuit supported the District Court's decision based on the *Youngs' failure to produce evidence demonstrating imminent danger. Id.*

Similarly, the Third Circuit agreed with the District Court that Mr. Foore failed to satisfy the immediate irreparable injury requirement. (Petitioners' App. A-8). Further, the Third Circuit stated that the District Court had correctly found that Country Fair's decision to terminate its franchise agreement with Mr. Foore would not impede the Court's ability to grant an effective remedy. *Id.* In addressing Mr. Foore's alternative request that he be permitted to remain on the premises without a franchise agreement, the Third Circuit agreed with the District Court that the request was untenable. *Id.*

The Third Circuit also took issue with Mr. Foore's argument that the District Court erred by ignoring his ultimate claims for equitable relief when it denied his motion for preliminary injunction. The Third Circuit stated the relief Mr. Foore was ultimately seeking was irrelevant to the District Court's determination that Mr. Foore had not met his burden of demonstrating irreparable harm. (Petitioners' App. A-9).

With respect to both the Youngs and Mr. Foore, the Third Circuit concluded it was unnecessary to address the other arguments in support of their motions for preliminary injunctions because both parties had failed to establish immediate irreparable injury. *Id.* Accordingly, the Third Circuit affirmed the District Court's decisions and concluded that the District Court's denial of the Youngs' and Mr. Foore's motions was not an abuse of discretion, an error of law or a mistake in considering the proof. (Petitioners' App. A-2).

SUMMARY OF REASONS WHY THE PETITION SHOULD BE DENIED

This Petition for Writ of Certiorari should be denied. The Third Circuit's decision affirming the denial of Petitioners' Motions for Preliminary Injunction does not conflict with decisions in other circuits involving similar circumstances. Federal courts throughout the country have consistently and uniformly held that in order to obtain a preliminary injunction, a moving party must show, at the very least, 1) a likelihood of success on the merits and 2) a probability of immediate irreparable injury. Both Petitioners failed to meet their burden of demonstrating immediate irreparable injury and thus, are not entitled to preliminary relief.

There is no conflict in the circuits as to whether loss of business constitutes irreparable injury. When, as in this case, the loss of customers results in purely economic harm which is compensable by monetary damages, the courts have concluded that this is not irreparable injury. More importantly, the question of whether loss of business can constitute irreparable harm depends solely on the facts of each case. Factual differences among cases do not give rise to a conflict in the circuits. For the same reason, Petitioners' reliance on *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197 (2d Cir. 1970) is misplaced because, as many courts have recognized, the *Semmes* holding is based squarely on the specific facts of that case.

Petitioners' argument that the Third Circuit incorrectly interpreted the scope of the Clayton Act §16 remedy is to no avail. Since Petitioners failed to satisfy the requirements necessary for a preliminary injunction, the Court's powers under the Clayton Act are of no consequence.

The lower courts' failure to address Petitioners' argument that a preliminary injunction was necessary so that they might generate evidence for trial is not a basis to grant certiorari. The novelty of the argument aside, once the lower courts determined that Petitioners failed to demonstrate immediate irreparable injury, it was unnecessary for those courts to address Petitioners' additional arguments. Failure of a movant

to satisfy one of the crucial elements necessary to obtain a preliminary injunction provided sufficient basis to defeat Petitioners' motions.

The Petition for Writ of Certiorari should also be denied because this Court's favorable resolution of Petitioners' issues would not alter the fact that Petitioners are incapable of satisfying the other prerequisites for a preliminary injunction. Hence, the decisions below would be affirmed regardless of the issue presented here.

Finally, the Petition should be denied because the question which Petitioners present is neither new nor a compelling question of law warranting this Court's review. Resolution of the questions presented affects only the parties in this case. This is not a case of national importance nor is it a case which presents novel legal issues. Moreover, it is a fact specific question. The issues which Petitioners ask this Court to address have long been settled and currently receive uniform treatment by the federal courts. For all of these reasons, the Petition for Writ of Certiorari should be denied.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE THIRD CIRCUIT'S DECISION IS NOT IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS AND FOLLOWS WELL ESTABLISHED PRINCIPLES THAT ECONOMIC LOSS DOES NOT CONSTITUTE IRREPARABLE INJURY

Petitioners' primary basis for the Petition for Writ of Certiorari is their claim that there is a conflict in the circuit courts as to whether loss of business constitutes irreparable harm. Petitioners rely on a series of old cases, including *Semmes,* for the proposition that loss of business and customers constitutes irreparable injury. Not only are the cases cited by Petitioners factually distinguishable from the present case, Petitioners have also ignored the fact that what they interpret to be a conflict among the circuits is nothing more than distinct decisions based upon the individual facts and issues presented to each court. For these reasons, the Petition for Writ of Certiorari should be denied.

A. All Of The Circuit Courts Uniformly Require That A Movant Demonstrate Immediate Irreparable Injury And Likelihood Of Success On The Merits For A Preliminary Injunction To Issue

There is no dispute among the circuit courts that a party seeking a preliminary injunction must satisfy several uniform requirements. For example, the Third Circuit has held that a plaintiff must meet certain burdens before the extreme remedy of a preliminary injunction will be granted. *In re Arthur Treacher's Franchisee Litigation*, 689 F.2d 1137 (3d Cir. 1982). These include: (1) a reasonable probability of eventual success on the merits and (2) that the movant will be irreparably injured *pendente lite* if relief is not granted. *Id.* at 1143. In addition, while the burden rests upon the moving party to make these two requisite showings, the District Court also must take into account, when they are relevant: (1) the possibility of harm to other interested persons from the grant or denial of the injunction and (2) the public interest. *Id.* (citing *Oburn v. Shapp*, 521 F.2d 142, 147 (3d Cir. 1975)).

Without exception, all federal appellate courts require a movant to demonstrate irreparable harm and a likelihood of success on the merits in order for a preliminary injunction to issue. *See, e.g., Goff v. Harper*, 60 F.3d 518 (8th Cir. 1995); *Tough Traveler, Ltd. v. Outbound Products*, ____ F.3d ____, 1995 WL 438394, No. 1691, Docket 94-9286 (2d Cir. July 21, 1995); *Church v. City of Huntsville*, 30 F.3d 1332 (11th Cir. 1994); *Stanley v. University of Southern California*, 13 F.3d 1313 (9th Cir. 1994); *Keweenaw Bay Indian Community v. Michigan*, 11 F.3d 1341 (6th Cir. 1993); *Autoskill, Inc. v. National Educational Support Systems, Inc.*, 994 F.2d 1476 (10th Cir.), *cert. denied*, 114 S.Ct. 307 (1993); *Roho, Inc. v. Marquis*, 902 F.2d 356 (5th Cir. 1990); *Roger Corp. v. Litton Systems, Inc.*, 757 F.2d 1266 (D.C. Cir. 1985); *Massachusetts Association for Retarded Citizens, Inc. v. King*, 668 F.2d 602 (1st Cir. 1981); *O'Connor v. Board of Education of School District No. 23*, 645 F.2d 578 (7th Cir.), *cert. denied*, 454 U.S. 1084 (1981); *Maryland Undercoating Co., Inc. v. Payne*, 603 F.2d 477 (4th Cir. 1979).

While some federal courts, such as the Third Circuit, require that a movant satisfy these standards without consideration of other issues, other courts engage in a balancing test to determine the burden of proof necessary for each element. *See e.g., Jeffrey Milstein, Inc. v. Greger, Lawlor, Roth, Inc.*, 58 F.3d 27 (2d Cir. 1995). Regardless of the method employed, all federal courts engage in an almost identical analysis to determine whether the movant has satisfied all of the necessary requirements for the extraordinary relief of a preliminary injunction. Accordingly, there is no split in the circuits on this issue.

B. The Cases Upon Which Petitioners Rely To Assert A Conflict Among The Circuits Are Distinguishable And Inapposite To The Facts In This Case

It follows that if all of the circuits employ the same analysis to determine whether preliminary injunctive relief is warranted, the reason why some holdings appear to conflict is because the facts of each case are unique. "What may constitute irreparable harm in a particular case is, of course, dependent upon the particular circumstances of the case." *Oburn v. Shapp*, 521 F.2d 142, 151 (3d Cir. 1975). Petitioners have failed to recognize that the occurrence of irreparable harm is a highly fact specific determination. *See Roland Machinery Co. v. Dresser Industries*, 749 F.2d 380, 385 (7th Cir. 1984). ("Our discussion of the standard for ruling on requests for preliminary injunctions should have made clear that it is not possible to reconcile all the precedents, or even just all the ones in this circuit"). For this reason, Petitioners have mistakenly concocted a split in the circuits where one does not exist.

Petitioners rely on a series of cases for the proposition that a conflict exists regarding whether potential loss of business, customers and/or profits constitutes irreparable injury. Petitioners argue these cases demonstrate that the Third Circuit incorrectly relied on *Frank's GMC Truck Center* for the proposition that economic loss does not satisfy the irreparable injury requirement. The cases cited by Petitioners, however, do not support this conclusion. In fact, the cases cited by Peti-

tioners are all factually distinguishable from the present case and do not give rise to a conflict among the circuits. Moreover, examination of the reasoning which led those courts to grant injunctive relief, reveals that those courts would have also denied Petitioners' motions based upon the facts presented.

The two most recent cases cited by Petitioners in support of their proposition, *Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.*, 990 F.2d 25 (1st Cir. 1993) and *Roland Machinery Co.*, 749 F.2d 380, actually support the decision here. In both cases, plaintiff's request for a preliminary injunction was *denied* because it had not demonstrated it was about to suffer immediate irreparable injury. This is exactly what occurred in the case at bar.

In *Coastal Fuels,* the First Circuit held that in addition to failing to demonstrate that it had a likelihood of success on the merits, plaintiff had also failed to show that it would "suffer 'irreparable harm' that a later damage award could not avoid." 990 F.2d at 27. The court reached this conclusion despite plaintiffs' allegations that they would not be able to continue doing business without a preliminary injunction. *Id.* Similarly, in *Roland Machinery,* the Seventh Circuit reversed the district court's grant of a preliminary injunction despite plaintiff's contention that it would go out of business without one. 749 F.2d at 396.

All of the other cases cited by Petitioners are distinguishable because they turn upon individual facts. This is most obvious when reviewing the factors which persuaded the court in *Semmes* to grant a preliminary injunction enjoining defendant from terminating the plaintiff's car dealership. In *Semmes,* the court determined that the loss of the dealership was sufficient to satisfy the irreparable injury requirement because the plaintiff had run his business for *twenty years* so that the loss of the business would be a tremendous hardship.

Contrary to many of the cases cited by Petitioners which were decided immediately following the *Semmes* decision, many recent decisions have not followed *Semmes* precisely because its holding was so fact specific. For example, the Second Circuit declined to follow *Semmes* in *Jack Kahn Music Co., Inc. v. Baldwin Piano & Organ Co.*, 604 F.2d 755 (2d Cir.

1979) because the court determined that the most significant aspect of *Semmes* was not that the loss of the dealership constituted irreparable harm, but rather that "the dealership had continued over twenty years during which Semmes had built up a very considerable goodwill in Scarsdale and the dealer's son had recently entered the business, doubtless with hopes of succeeding to it when his father became too old." 604 F.2d at 761. Without question, the fact that Semmes had run his dealership for over two decades and the fact that his son aspired to own it after his father's retirement was clearly given great weight by the court. For this reason, the *Jack Kahn* court concluded that it was inappropriate to apply *Semmes* to any and every case where the movant faced a loss of business which money damages would more than adequately compensate. Indeed, the *Jack Kahn* court vacated a district court's entry of a preliminary injunction and held that the potential loss of business, based upon a contract which was only one and one-half years old, was insufficient to satisfy the irreparable injury requirement.

Similarly, in *Flagship Federal Savings Bank v. Wall*, 748 F.Supp. 742, (S.D.Cal. 1990), despite the plaintiff's reliance on *Semmes* and its allegations that it would be irreparably harmed by lost business opportunities, the court found the *Semmes* holding "limited to its facts", *Id.* at 747, and refused to order relief. Like the court in *Jack Kahn*, the *Flagship* court found it noteworthy that *Semmes* held "the 'right to continue a business in which William Semmes had engaged for *twenty years* and into which his son had recently entered is not measurable *entirely* in monetary damages'." *Id.* (citations omitted) (emphasis added).

Without question, the *Semmes* holding cannot be extended to other cases because that court's decision is inextricably intertwined with the facts in that case. Cases which have followed *Semmes* have done so only because the facts of those cases warranted extraordinary relief. In this case, however, the District Court, which is in the best position to review the facts available in the record, determined extraordinary relief was not warranted because the damages Petitioners *may* suffer absent injunctive relief are not irreparable. A cursory

review of the facts presented to the District Court demonstrates why injunctive relief is not warranted in either the Youngs' or Mr. Foore's case.

1. The *Semmes* Holding is Inapplicable to the Youngs' Case

With respect to the Youngs, any lost profits or loss of customers resulting from the locked gasoline pumps is due to their actions, not those of Country Fair. *It was the Youngs who, without warning, terminated their franchise agreement with Country Fair.* It was the Youngs' theft of gasoline which precipitated the locking of the gasoline pumps in January, 1993. For several days after the Youngs' unilateral termination of the franchise agreement, the Youngs used Country Fair's gasoline equipment and sold thousands of gallons of its gasoline without the consent of Country Fair. At no time have the Youngs ever reimbursed Country Fair for the use of its equipment or for the sale of its assets. Country Fair exercised its right to protect its property. It locked its gasoline equipment to prevent further depletion of its assets and other risks of loss. Any injury the Youngs may have suffered, or will suffer, is of their own doing.

Unlike the plaintiff in *Semmes,* the Youngs' request for a preliminary injunction has nothing to do with a manufacturer's bad faith termination of a dealer. Here *the Youngs* terminated their franchise agreement. Moreover, unlike Semmes, the Youngs are still conducting their convenience store business. They have been precluded only from selling gasoline using Country Fair's equipment. Country Fair was simply protecting its property and assets from wrongful conversion when it locked its pumps. If the Youngs are now suffering some loss of business, it is because of their own actions. There was and is no just reason to compel Country Fair to open its pumps to ameliorate the effects of the Youngs' own intentional misconduct. Accordingly, the Youngs' reliance on the *Semmes* decision is misplaced.

2. The Holding in *Semmes* is Inapplicable to Mr. Foore's Case

Similarly, the facts of Mr. Foore's case significantly distinguish him from the plaintiff in *Semmes*. In *Semmes*, the court entered a preliminary injunction to preserve a *successful* dealer which had been in operation for *twenty years*. In contrast, Mr. Foore had been an unsuccessful Country Fair franchisee for only *four* years when Country Fair first gave notice of its desire to terminate the relationship. In those four years, Mr. Foore incurred growing substantial financial losses which were borne in an ever increasing percentage by Country Fair. There is simply no comparison between Mr. Foore's situation and that of the capricious termination of a long term profitable dealer in danger of losing his successful twenty year investment.

Moreover, as opposed to the plaintiff in *Semmes* who desired to continue as a Ford dealer, Mr. Foore seeks just the opposite relief — the rescission of the franchise agreement. This is perhaps the best evidence that Mr. Foore will not be irreparably harmed because he is not seeking the indefinite perpetuation of that agreement.

Further, Mr. Foore has recognized that the "status quo" that he sought to maintain with a preliminary injunction "is a franchise agreement which I claim is illegal and fraudulent". (Foore J.A. 129). Credit for novelty aside, it is inconceivable that Mr. Foore could be irreparably harmed by the termination of his franchise agreement when that is the very goal of his law suit. Since Mr. Foore contends that the franchise agreement is fraudulent, it is difficult to fathom how the termination of an alleged fraudulent agreement would, in any way, irreparably injure him.

The other significant distinction between *Semmes* and Mr. Foore's case is that in *Semmes,* Ford was limited to terminating Semmes' dealership only in accordance with the Federal Dealer Act, 15 U.S.C. §1222. Under this Act, Ford could only terminate a dealer who submitted false or fraudulent reports or statements to the company and the dealer had a right to cure his failure to perform and prevent the termination of his

dealership. In Mr. Foore's case, however, his franchise agreement with Country Fair provides that *either* party can terminate the agreement for *any* reason, at *any* time with thirty days notice.

Finally, the termination of Mr. Foore's franchise agreement does not, in any manner, prevent him from owning and operating his own convenience store in Wheatland. He simply cannot do it with Country Fair's leasehold, equipment and subsidy. Accordingly, the holding in *Semmes* is inapplicable.

C. Recent Cases Hold That Economic Loss Does Not Constitute Irreparable Injury

Despite Petitioners' arguments, more recent decisions by circuit courts have found loss of business, customers and/or profits a purely economic loss for which monetary damages can compensate. Accordingly, the courts have held that these kinds of losses do not constitute irreparable injury. As discussed above, the Second Circuit in *Jack Kahn* held that potential loss of business did not satisfy the irreparable injury prong. The court in *Flagship* also determined that potential lost business opportunities were not irreparable injuries.

Further, the Third Circuit has also determined that monetary injury will not satisfy the necessary burdens to achieve a preliminary injunction. *See Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797 (3d Cir. 1989); *Frank's GMC Truck*, 847 F.2d 100. In *Instant Air Freight* the Third Circuit stated:

> Here the monetary damages which Instant alleges it is suffering are capable of ascertainment and award at final judgment if Instant prevails. These money damages will fully compensate Instant for its losses.

Id. at 801. Similarly, in *Frank's GMC Trucks*, the Third Circuit stated:

> [A] purely economic injury, compensable in money, cannot satisfy the irreparable injury requirement. "Although we are not insensitive to the financial distress suffered by [the plaintiff], we do not believe that loss of income alone constitutes irreparable harm."

847 F.2d at 102 (*citing Morton v. Beyer*, 822 F.2d 364, 372 (3d Cir. 1987)).

Other courts have also held that loss of business can be compensated by money damages and hence, cannot constitute irreparable injury. *See, e.g., Coastal Fuels, 990 F.2d 25; DFW Metro Line Services v. Southwestern Bell Telephone Co.*, 901 F.2d 1267, 1269 (5th Cir.), *cert. denied*, 498 U.S. 985 (1990) (denial of preliminary injunction affirmed due to plaintiff's failure to demonstrate that money damages would be inadequate compensation). These cases compel the conclusion that there is not a conflict in the circuits, but merely a difference in facts among the cases. Accordingly, the Youngs' and Mr. Foore's Petition for Writ of Certiorari should be denied.

II. THE COURT OF APPEALS' RULING NEITHER VIOLATES THE CLAYTON ACT NOR PRECLUDES THE COURT FROM ULTIMATELY AWARDING LEGAL AND/OR EQUITABLE RELIEF

Petitioners contend that in affirming the denial of their motions for preliminary injunction, the Third Circuit was, in effect, holding that §16 of the Clayton Act does not permit a federal court to order the defendant to continue supplying the "tying product" to the plaintiff. This argument is not only without legal support and illogical, it is nothing more than a red herring to distract this Court from the deficiencies in the Petition. The Third Circuit's decision does not in any manner limit the equitable powers that §16 of the Clayton Act, 15 U.S.C. §26, confers on the federal courts. Here the Third Circuit simply concluded that Petitioners had not demonstrated irreparably injury.

Careful review of Petitioner's argument reveals its fallacy. Simply because §16 of the Clayton Act provides that an antitrust plaintiff may be entitled to injunctive relief, does not lead to the conclusion that Petitioners: 1) are excused from satisfying the requirements necessary for a preliminary injunction; and 2) are automatically entitled to the relief they seek. Further, §16 of the Clayton Act does not permit a court to enter an injunction which alters the status quo pending trial and which compels third parties to become involved in the dispute.

Regardless of the ultimate relief which Petitioners seek and regardless of the equitable relief that the court may bestow upon them, in order for them to obtain preliminary injunctive relief, they must demonstrate that they are in danger of suffering immediate irreparable injury. This requirement appears not only in the common law — it exists in the statute as well. Section 16 of the Clayton Act provides:

> Any person . . . shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . and upon the execution of proper bond against damages for an injunction improvidently granted and *a showing that the danger of irreparable loss or damage is immediate,* a preliminary injunction may issue . . .

Id. (emphasis added).

There is nothing in the statute which creates an exception for a plaintiff with tying claims being excused from the irreparable injury requirement. The antitrust laws prohibit the tying of one product to another which results in harm to competition. They do not mandate nor require the provision of the tying product in all instances to all parties. Accordingly, Petitioners' request for certiorari because they are being deprived of the tying product without an injunction is to no avail.

Mr. Foore argued the same issue to the Third Circuit in a somewhat different guise. He contended the District Court had ignored his claim for ultimate injunctive relief and that by denying his motion for preliminary injunction, it had concluded that "he was not free to pursue any antitrust claims for injunctive relief." (Petitioners' App. A-8, 9). The Third Circuit found Mr. Foore's contentions erroneous because "[t]he permanent relief requested by Foore is irrelevant to the district court's determination of irreparable harm. If Foore were to succeed on the merits, the district court will be free to fashion whatever legal or equitable relief is warranted." (Petitioners' App. A-9).

Petitioners' Clayton Act argument also fails because the relief which they seek through the Clayton Act would severely alter the status quo pending trial, not preserve it. This Court

has held that "[t]he purpose of a preliminary injunction is merely to *preserve* the relative positions of the parties until a trial on the merits can be held." *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). Mr. Foore, however, seeks much more. He wants to have his franchise agreement terminated but be permitted to remain at the site of his former franchise store pending trial.

Although below Mr. Foore sought alternative forms of preliminary relief, it appears he has now abandoned his request to have Country Fair enjoined from terminating his franchise agreement. Rather, he now seeks to have the agreement terminated but keep possession of Country Fair's premises and equipment. *See* Petitioners' Brief at 12, 23-24. Thus, Mr. Foore is seeking to change the status quo from one where he is a Country Fair franchisee to one where there is no relationship with Country Fair, but he remains on Country Fair's leasehold premises and uses Country Fair's equipment to run his store independent of Country Fair. Mr. Foore's request not only contravenes the purpose of a preliminary injunction, but as the Third Circuit found, it is also specious. (Petitioners' App. A-9).

Similarly, the Youngs seek to use Country Fair's gasoline equipment despite having terminated their franchise agreement. Like Mr. Foore, the Youngs also seek a change in the status quo to create a new relationship.

There is no language in §16 of the Clayton Act which suggests that it can be used to order a preliminary injunction which alters the status quo. There is also nothing in the statute which suggests that it is permissible to alter the status quo simply because the movant has made antitrust tying allegations. The relief which Petitioners seek is simply untenable and cannot be compelled. (Petitioners' App. A-16).

Moreover, Mr. Foore requests relief which would require the court to not only force Country Fair to sublease space to him but which would also force non-parties to this litigation, the owners of the property, to rent the property to him. As the District Court stated in its opinion, "[e]ven if Mr. Foore succeeds on the merits of his claims, this result could not be compelled. He would be entitled to damages, not gifts of leasehold

interests and equipment." (Petitioners' App. A-16). The Clayton Act was not meant to be used to needlessly involve non-parties to the litigation in the dispute. Accordingly, the Petition for Writ of Certiorari should be denied.

III. PETITIONERS SHOULD NOT BE PERMITTED TO USE A PRELIMINARY INJUNCTION AS A TOOL TO MANUFACTURE EVIDENCE IN SUPPORT OF THEIR ACCUSATIONS

Despite the numerous allegations in their Complaints regarding Country Fair's wrongdoing, Petitioners' motions for preliminary injunction are devoid of any evidence that they will suffer irreparable loss of profits or loss of goodwill without injunctive relief. In fact, Petitioners boldly contend they require a preliminary injunction to enable them to manufacture evidence which they might later use to support their allegations at trial. The Youngs and Mr. Foore argue that the very absence of supporting evidence constitutes irreparable injury because if they are not given an opportunity to generate corroboration, they will not succeed on the merits of their claims. This argument is absurd.

Despite the numerous affidavits and declarations filed by Petitioners in their effort to obtain injunctive relief, they have failed to offer any concrete evidence regarding the injury they will suffer absent an injunction. The best indication the Youngs could offer was that a decrease in customer traffic *could* result in the loss of their business. (Young J.A. 1241). This is insufficient. *See Punnett v. Carter,* 621 F.2d 578, 587 (3d Cir. 1980). The Youngs failed to provide any financial data or accounting evidence that their business had, in fact, decreased or that it is in danger of decreasing further in the future. "Mere assertions of dire economic effects cannot, without some concrete proof, meet the irreparable harm standard." *Coca-Cola Bottling Co. of Elizabethtown, Inc. v. Coca-Cola Co.,* 668 F.Supp. 906 (D.Del. 1987).

More importantly, the assertions offered by the Youngs undermine their argument. In their declaration the Youngs asserted that they are making *more* money now than they

were as a Country Fair franchisee. (Young J.A. 1250). This statement is telling for two reasons. First, obviously, the Youngs have not been injured if they are making more money now. Second, the fact that they know they are making more money now indicates there is evidence of how much they made under the Country Fair system. Without a doubt, the Youngs have not demonstrated that they need an injunction.

Similarly, Mr. Foore alleged that without a preliminary injunction, he may lose goodwill. Mr. Foore did not offer any evidence, however, of this potential loss of goodwill. Thus, his arguments too fell far short of what is needed to demonstrate immediate irreparable injury. For these reasons, the Petition for Writ of Certiorari should be denied.

IV. THE DECISION OF THE COURT OF APPEALS WAS CORRECT AND THE ISSUES PRESENTED BELOW DO NOT MERIT REVIEW BY THIS COURT

The Petition for Writ of Certiorari should also be denied because it fails to meet any of the criteria for certiorari. As discussed above, the issues raised in this appeal do not involve a conflict in the circuit courts. Additionally, the issues raised in this appeal are so unique to the Youngs and Mr. Foore that their resolution will affect no one other than the litigants. It is difficult to imagine another case where a franchisee terminates a franchise agreement, holds over on the subleased premises, sues the franchisor, and then brings a motion for a mandatory preliminary injunction seeking an order to force the franchisor to provide its gasoline equipment to the former franchisee. Given that the present case turns upon its own facts and the resolution of the issues presented would not be of any significance to anyone other than the parties, the Petition should be denied.

In addition, the Petition should be denied because Petitioners have also not satisfied the other requirements for a preliminary injunction. Hence, even if the Court found irreparable injury, Petitioners would still not be entitled to a preliminary injunction. Neither the Youngs nor Mr. Foore offered any concrete evidence that they would succeed on the merits of

their complaints. In fact, the gist of both of Petitioners' motions was based upon unsupported averments made on "information and belief." Averments based on such prayers do not demonstrate a reasonable likelihood of success on the merits especially when the claims are based on fraud. The best evidence of Petitioners' inability to establish likelihood of success on the merits is their own argument that they need an injunction to secure evidence for their claims.

Mr. Foore would also not be entitled to injunctive relief because it would result in great harm to Country Fair. In ruling on a request for a preliminary injunction, a court must also consider the effect the injunction would have on the non-moving party. *See Campbell Soup Co. v. ConAgra, Inc.*, 977 F.2d 86, 91 (3d Cir. 1992); *Bradley v. Pittsburgh Board of Education*, 910 F.2d 1172, 1175 (3d Cir. 1990). Under either of the alternative preliminary injunctions originally requested by Mr. Foore, Country Fair would incur substantial losses which cannot be recovered, since Mr. Foore has stated that he has no assets. (Foore J.A. 121). Since 1989, Country Fair has incurred losses in excess of $150,000 as a result of the operation of the Foore franchise. (Foore J.A. 172). These losses have grown each year. *Id.* Continuation of the franchise relationship would only increase the losses to Country Fair.

Of even greater significance is the operation of the franchise itself. A successful franchise requires the cooperation and trust between the franchisee and the franchisor. Obviously, as a result of this litigation, Mr. Foore has no incentive nor reason to cooperate with Country Fair. The Second Circuit has recognized the significant hardship of forcing a manufacturer to continue in a dealer relationship with a dealer with whom it no longer wishes to be associated. *See Jack Kahn*, 604 F.2d at 764. That same principal is even more applicable here.

Mr. Foore's alternative request for injunctive relief results in even greater harm to Country Fair. Under that alternative, Mr. Foore requests that the court order the termination of the franchise agreement but permit Mr. Foore to "stay on the premises" and keep or lease Country Fair's equipment. Country Fair, however, is obligated to pay rent, insurance, a portion of the taxes and other expenses for the premises. (Foore J.A.

169). In the absence of a franchise relationship, the court would be compelling Country Fair to make a gift of the leasehold interest and the equipment to Mr. Foore. A preliminary injunction cannot be used to take property out of the possession of one party and put it into the possession of the other. *Gamlen Chemical Co. v. Gamlen,* 79 F.Supp. 622, 631 (W.D.Pa. 1948). For this reason, it would be inappropriate for Mr. Foore to be granted a preliminary injunction.

Petitioners are also not entitled to injunctive relief because it would require substantial court supervision. Courts have routinely and repeatedly denied preliminary injunctions requiring court supervision. *See Roland Machinery,* 749 F.2d at 391; *CBL & Assoc., Inc. v. McCrory Corp.,* 761 F.Supp. 807 (M.D.Ga. 1991); *8600 Associates, Ltd. v. Wearguard Corp.,* 737 F.Supp. 44 (E.D. Mich. 1990); *Gilchrist Machinery Co., Inc. v. Komatsu America Corp.,* 601 F.Supp. 1192 (S.D.Miss. 1984); *Grossman v. Wegman's Food Markets, Inc.,* 43 A.D.2d 813, 350 N.Y.S.2d 484 (1973).

If Mr. Foore is granted a preliminary injunction compelling the continuation of the franchise agreement during the course of the litigation, it will require vigilant and constant court supervision to ensure that both parties comply with all terms of the franchise agreement. Moreover, if Mr. Foore is permitted to remain on the premises without a franchise agreement, the court would be required to rewrite the agreement between the parties to determine who would pay the rent, taxes, insurance and other property related expenses, as well as possibly involve a non-party to the litigation, the owner of the premises.

Similarly, if the gasoline pumps were ordered opened for the Youngs, significant judicial supervision would be mandated. The court will have to determine among other things: who will be allowed to lease the pumps, what is a fair rental value, who should be allowed to supply gasoline to the tanks, the hours the pumps should be operated and who should pay the taxes and liability insurance on the pumps. Given the nature of gasoline, the taxes that must be paid, as well as the liability arising from the operation of gasoline equipment, this supervision is considerable. Accordingly, the need for judicial

supervision mandates that neither Petitioner would have been granted injunctive relief, even if they had demonstrated irreparable injury.

Finally, the public interest does not support a preliminary injunction because the public does not have a significant interest in having Mr. Foore continue to operate his convenience store or in having the gasoline pumps unlocked at the Youngs' store. Both Mr. Foore and the Youngs are seeking to provide services that the public can easily secure elsewhere. For all of these reasons, the Petition for Writ of Certiorari should be denied.

V. THE THIRD CIRCUIT'S DECISION IS INTERLOCUTORY IN NATURE AND THEREFORE THE COURT SHOULD DENY THE YOUNGS' AND MR. FOORE'S PETITION

Certiorari jurisdiction is "to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision .... And, except in extraordinary cases, the writ is not issued until final decree." Robert L. Stern et al., Supreme Court Practice 196 (7th ed. 1993) (quoting *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916)). Consequently, the interlocutory nature of a federal court of appeals judgment may "of itself alone" constitute "sufficient ground for the denial of the application" for certiorari. *Id.* Although the Court has granted certiorari where the interlocutory judgment presented a novel and important issue of law and where the petitioner's position, if embraced, would render the court of appeals decision void, *American Construction Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372 (1893), none of those circumstances exist here. This case does not involve a novel nor important issue of law. The case simply involves a factual question limited to the parties in this matter.

No final judgment has been rendered in this case. In fact, although Petitioners filed this case as a class action, their Motion for Class Certification is still pending. Discovery has begun, but is far from complete. Efficiency dictates that the

Court's review be deferred until there has been a final judgment. As one commentator has asked "why should the vast clanking machinery of the United States Supreme Court be mobilized to decide a question that may not make a difference in the outcome of the case?" Stewart A. Baker, *A Practical Guide to Certiorari*, 33 Cath. Univ. L. Rev. 611, 628 (1984). Here, given the unique facts of this case, the denial of this request for preliminary injunction does not warrant this Court's review.

CONCLUSION

The Petitioners have had their chance at bat. They have swung and missed — not because the umpires were unfair, but because they had no bat. They could show no irreparable harm, no conflict in the circuits, no judicial error, nor overriding public interest. In the absence of an error, no one gets to first base on a strike out. To argue that a preliminary injunction should be granted so that evidence can now be gathered, is like asking for batting practice while the game is pending. It simply does not happen.

Accordingly, the Youngs and Mr. Foore's Petition for Writ of Certiorari should be denied.

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